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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

OMICRON CHAPTER OF KAPPA ALPHA THETA SORORITY et al., Plaintiffs and Appellants, v. UNIVERSITY OF SOUTHERN CALIFORNIA, Defendant and Respondent.	B292907, B294574 (Los Angeles County Super. Ct. No. BC711155)

APPEAL from an order of the Superior Court of Los Angeles County, Patricia Nieto, Judge. Reversed and remanded with directions.

Kirkland & Ellis, R. Alexander Pilmer and Michael D. Lieberman, for Plaintiffs and Appellants.

Paul Hastings, J. Al Latham, Jr., and Elizabeth S. Minoofar, for Defendant and Respondent.

Education Code section 94367 (section 94367), enacted as part of what is commonly known as the Leonard Law, provides: "No private postsecondary educational institution shall make or enforce a rule subjecting a student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution." (§ 94367, subd. (a).) We consider whether plaintiffs, four fraternities and a sorority at defendant University of Southern California (USC),[1] allege a proper section 94367 claim and are entitled to preliminarily enjoin USC's "deferred recruitment" policy, which bars students from joining a fraternity or sorority until they have satisfied certain academic requirements.

I. BACKGROUND

Plaintiffs and other Greek-letter organizations are "recognized student organizations" (RSOs) at USC. After soliciting views from university stakeholders, including parents and alumni, USC's Vice President for Student Affairs, Dr. Ainsley Carry, addressed a letter to the USC Community in the fall of 2017 that announced "effective Fall 2018, all USC students who wish to participate in Greek organization recruitment must

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[1] Plaintiffs are the Alpha Upsilon Chapter of Sigma Chi Fraternity, the Gamma Tau Chapter of Beta Theta Pi Fraternity, the Alpha Nu Chapter of Theta Xi Fraternity, the Beta Sigma Chapter of Tau Kappa Epsilon Fraternity, and the Omicron Chapter of Kappa Alpha Theta Sorority.

have completed a minimum of 12 academic units, and [have] a minimum USC grade point average of 2.5." Ordinarily, a USC student will complete 12 academic units after the first semester of his or her first college year.

Dr. Carry's letter included language acknowledging the "positive impact" that Greek-letter organizations can have on student life, including "by providing spaces for personal connection, brotherhood/sisterhood, academic support, and philanthropic engagement." He emphasized, however, that students' first year of enrollment "is the toughest year of the transition to college life" and USC had "continued [to] review[ ] the most effective ways to support students in their first year . . . ." Dr. Carry noted "[a] number of our peer institutions have implemented policies that support first-year students by allowing them time to acclimate to the university's academic and social climate before participating in Greek-letter organizations" and explained USC had similarly "concluded that the benefit of allowing new students one semester to acclimate to USC academics and social life far outweigh[s] the benefits of not making this policy change."

After unsuccessful informal efforts to convince Dr. Carry to rescind the deferred recruitment policy,[2] plaintiffs sued in June 2018 to obtain a declaration that the policy violates section 94367 and an injunction to prevent USC from enforcing the policy.

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[2] These efforts included a proposal by one of the plaintiff fraternities to replace the deferred recruitment policy with "significant concrete proposals to reduce alcohol consumption and to continue to eliminate hazing," with "severe penalties [that] could be imposed should any student or organization be found to have violated these restrictions."

Plaintiffs' complaint alleges they have standing "to assert claims for violation of the Leonard Law on their own behalf, and on behalf of their individual members." Plaintiffs allege they have a First Amendment right "to associate freely with those they choose," a right assertedly infringed by the deferred recruitment policy. And plaintiffs assert USC's deferred recruitment policy "is blatantly discriminatory against [p]laintiffs' First Amendment rights, as no other on-campus group is subject to the one-semester waiting period."

Plaintiffs' complaint also describes the asserted harms plaintiffs would face if the deferred recruitment policy were not enjoined. Plaintiffs allege "[t]he majority of residents in sorority and fraternity housing are sophomores" and "[i]f the second semester of freshman year is the earliest possible time for students to join a sorority or fraternity, this will cause significant decline in the live-in percentage of sororities and fraternities," which in turn would cause "devastating rent shortfalls." Plaintiffs allege this reduction in revenue would curtail their ability to engage in what they contend is expressive activity. Plaintiffs further allege the deferred recruitment policy could lead to fewer students opting to join a fraternity or sorority, explaining: "The first semester of college is the period when the vast majority of students who choose to join sororities and fraternities at USC decide to join. The prime reason why young women and men decide to join a sorority or fraternity is to find a community that they are proud to call home. When barred from joining a sorority or fraternity during their first semester, students may feel pressured to join other groups, or forego joining sororities and fraternities altogether."

Shortly after filing their complaint, plaintiffs moved to preliminarily enjoin the deferred recruitment policy. USC opposed the motion, submitting a declaration from Dr. Carry. His declaration noted over twenty well-known universities had adopted a deferred recruitment policy similar to USC's. He also explained the rationale behind adoption of such policies, and why fraternities and sororities were different than other on-campus groups: "Deferred recruitment policies such as USC's aim to support new students, often away from home for the first time, by allowing time to acclimate to the social and academic challenges of secondary education, before participating in Greek life. The immersive nature of the Greek experience is well-known, encompassing a student's social framework and extracurricular activity—unique from other student activities such as a cappella, the swim team, or a chess club. The benefit of a semester to develop positive academic and social habits in a new environment allows young students time to mature and adjust to life on campus, before taking on the added commitment of fraternity or sorority affiliation."

The trial court denied plaintiffs' preliminary injunction motion. The court found plaintiffs did have standing to bring a section 94367 claim, concluding an association may sue on behalf of its members and participation of individual students in the lawsuit was not necessary under the statute. But the court found plaintiffs had shown no likelihood of success on the merits of their suit because section 94367 requires a showing that USC "ma[de] or enforce[d] a rule subjecting a student to disciplinary sanctions" and plaintiffs "simply ha[d] not shown that the [deferred recruitment policy] was created as a disciplinary sanction against any sorority or fraternity for failure to abide by

university policies or against any individual student for violating the standards and policies established for sororities and fraternities." Because it viewed this issue as dispositive, the trial court expressly declined to reach the question of whether the balance of interim harms tipped in USC's or plaintiffs' favor.

In the meantime, USC had filed a demurrer to plaintiffs' complaint, arguing plaintiffs had failed to state a cause of action under section 94367. The trial court took up USC's demurrer after its preliminary injunction ruling and granted the demurrer without leave to amend. Carrying over its reasoning in denying the preliminary injunction, the court found plaintiffs had not stated a section 94367 claim because they had not "alleged facts showing that the Policy is a disciplinary sanction." In addition, and in the alternative, the court further found plaintiffs' section 94367 claim was defective because the plain language of the statute indicates it applies only to free speech rights, not the right of association.

Plaintiffs appealed from the order denying the preliminary injunction and the ultimate order dismissing the action after the trial court sustained USC's demurrer. We consolidated the appeals for argument and decision.

II. DISCUSSION

There are First Amendment considerations on both sides in this case. To be more precise, on plaintiffs' side there are at play statutory protections for student free speech rights. (§ 94367; see also *Yu v. University of La Verne* (2011) 196 Cal.App.4th 779, 790 [section 94367 "creates *statutory* free speech rights for students of private postsecondary educational institutions"] (*Yu*).) At the same time, implicated on USC's side is the constitutional First

Amendment deference owed to a university's academic decisions (see, e.g., *Grutter v. Bollinger* (2003) 539 U.S. 306, 324, 328-329 (*Grutter*) [universities occupy a "special niche in our constitutional tradition" and the high court's cases "recognize[ ] a constitutional dimension, grounded in the First Amendment, of educational autonomy"]; *Regents of University of Michigan v. Ewing* (1985) 474 U.S. 214, 225 ["When judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment"].) This appeal chiefly concerns how to go about resolving the potential (or actual) tension between these considerations.

We hold plaintiffs have standing to sue because the organizations are entitled to assert, via section 94367, expressive associational interests of their members. But *only* of their members. No first-semester student (or academically struggling student) wishing to join a fraternity or sorority joined this action as a plaintiff, and the fraternities and sorority accordingly cannot assert—and we do not consider in our analysis—any First Amendment interests of such a student. That limitation is consequential. Plaintiffs do not allege their recruitment of students is itself an expressive activity; rather, all of plaintiffs' allegations concern what might be termed attenuated effects of the deferred recruitment policy, i.e., that recruited students will not be members for as long as they otherwise could have been during their college years and that plaintiffs will be financially worse off as a result of this truncated on-campus membership period. When stacked against the academic rationale that appears to animate the deferred recruitment policy, these alleged

burdens on plaintiffs' expressive associational rights would be insufficiently substantial to make out a section 94367 claim.

But plaintiffs' complaint further alleges the deferred recruitment policy arises not from a genuine academic judgment but from viewpoint discrimination, i.e., that USC simply disapproves of plaintiffs as expressive associations and singles them out for disfavored treatment for that reason. That is an issue we cannot decide at the demurrer stage, and we therefore reverse and remand for necessary factual development. We do not believe it is likely plaintiffs will prevail, but they must have their opportunity to make their case. And because the trial court never made a finding as to the balance of harms, we do not ourselves resolve whether plaintiffs are entitled to an injunction in the interim; rather, the trial court must revisit the preliminary injunction question on remand, informed by this opinion.

A. Standard of Review

We review de novo an order sustaining a demurrer without leave to amend. (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1010; *Morales v. 22nd Dist. Agricultural Assn.* (2016) 1 Cal.App.5th 504, 537.) "[W]e accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6[ ].) To determine whether the trial court should, in sustaining the demurrer, have granted the plaintiff leave to amend, we consider whether on the pleaded and noticeable facts there is a reasonable possibility of an amendment that would cure the complaint's legal defect or defects.

(*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081[ ].)" (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924, fn. omitted.) "A judgment of dismissal after a demurrer has been sustained without leave to amend will be affirmed if proper on any grounds stated in the demurrer, whether or not the [trial] court acted on that ground." (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324; accord, *E. L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 504, fn. 2 [validity of the trial court's *action*, not the *reason* for its action, is what is reviewable].)

B. Plaintiffs Have Standing to Sue, but the Standing They Have Cabins the Interests They May Assert

We have already quoted the text of section 94367, subdivision (a), which prohibits a private university from making or enforcing a rule subjecting a student to disciplinary sanctions based on "speech or other communication" that would be protected by the First Amendment but for the private educational setting. The statute also delimits those who are entitled to invoke its provisions, namely, "[a] student enrolled in a private postsecondary institution at the time that the institution has made or enforced any rule in violation of" the substantive statutory provision. (§ 94367, subd. (b).)

The action giving rise to this appeal includes no individual students as plaintiffs, only the fraternities and sorority. These organizational plaintiffs nevertheless have standing to sue because they are entitled to represent the interests of their individual members—and it is undisputed plaintiffs' membership includes students enrolled at USC at the time the university

adopted the deferred recruitment policy. (*San Francisco Apartment Assn. v. City and County of San Francisco* (2016) 3 Cal.App.5th 463, 472 ["[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit"], internal quotation marks omitted; *Airline Pilots Assn. Internat. v. United Airlines, Inc.* (2014) 223 Cal.App.4th 706, 726, 728 (*Airline Pilots*).)

It matters not, as USC contends, that section 94367 does not expressly confer standing on student associations. As *Airline Pilots* and other decisions illustrate, granting statutory standing in language that applies to individuals also generally confers standing on associations made up of those individuals insofar as the association advances claims its members could assert individually. (See, e.g., *Airline Pilots*, *supra*, 223 Cal.App.4th at p. 727 [union had associational standing to bring action on behalf of members for violation of California's Kin Care Law, Labor Code section 233, which provides that "[a]ny employee aggrieved by a violation of this section shall be entitled to reinstatement and actual damages or one day's pay . . . and to appropriate equitable relief"]; *Monterey/Santa Cruz etc. Trades Council v. Cypress Marina Heights LP* (2011) 191 Cal.App.4th 1500, 1513, 1522 [participation of individual union members not necessary in action to enforce rights under prevailing wage covenant applicable to "all workers employed in connection with the development" of project area].)

Though plaintiffs therefore have standing to sue, the news for them on the standing front is not all good. The qualification on associational standing to pursue member-based claims we have just emphasized—that the organizations have standing to assert the rights of *their members*—has important consequences in this case. Plaintiffs' operative complaint and appellate briefs are rife with allegations of an asserted infringement on the associational rights of students who might want to join a fraternity or a sorority but are not yet members. They argue, for instance, that the deferred recruitment policy "threatens discipline against first-semester students solely because they would associate with a sorority or fraternity" and they claim that "[t]he question . . . is not whether joining a Greek organization is 'speech,' but whether it is communicative conduct protected from governmental restriction."

These contentions are not a result of poor drafting but of a conscious choice: plaintiffs believe they are entitled to argue "the [deferred recruitment policy] burdens associational rights in two independent ways: 1) by threatening discipline against first-semester students who want to join a sorority, and 2) by interfering with the membership decisions of sororities themselves." But the first of these avenues is blocked for these plaintiffs: no non-member students participated in filing this action, and the fraternities and sorority that did have no standing to advance free association claims of non-members—in their words, "students who want to join a [fraternity or] sorority."[3] (See, e.g., *United States v. City of Miami* (11th Cir.

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[3] In contrast to plaintiffs' position on appeal, their section 94367 cause of action states the correct rule: "Plaintiffs have

1997) 115 F.3d 870, 872 ["An organization can sue based on injuries to itself or based on injuries to its members. However organizations lack standing to sue on behalf of non-members"].) Thus, in our analysis, we consider only those arguments plaintiffs raise regarding the expressive associational interests of the Greek organizations and their members.

C. Plaintiffs Sufficiently Allege a Burden on Expressive Association Rights Only When Taking As True Their Allegation That the Deferred Recruitment Policy Is Not a Product of USC's Genuine Academic Judgment

The trial court concluded plaintiffs did not state a proper section 94367 claim based on its interpretation of the statute's disciplinary sanctions language ("No private postsecondary educational institution shall make or enforce a rule subjecting a student to disciplinary sanctions . . ."). The court believed the statute required a showing that the deferred recruitment policy "was created as a disciplinary sanction against any sorority or fraternity for failure to abide by university policies or against any individual student for violating the standards and policies established for sororities and fraternities." And the court concluded plaintiffs had no prospect of making such a showing.

The trial court's reading of the statute to demand proof that USC adopted the deferred recruitment policy as itself a disciplinary sanction for some past wrong does not square with the text of the statute. The key statutory terms are "make" and "subjecting," which establish the prohibition imposed by section

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standing to assert claims for violation of the Leonard Law on their own behalf, and on behalf of their individual members."

94367 applies to university rules that have not yet been enforced but that render a student vulnerable to discipline for engaging in the conduct proscribed by the rule in question. (Oxford English Dict. Online (2018) <http://www.oed.com/view/Entry/192688?rskey=efxVu6&result=3&isAdvanced=false#eid> [as of Apr. 24, 2019] ["subject" means "[t]o lay open or expose to the incidence, occurrence, or infliction of something; to make liable to something"].) The deferred recruitment policy (in conjunction with USC's Student Handbook) does just that.

The trial court's alternative rationale was also faulty. Section 94367 provides protection for on-campus "speech or other communication." (§ 94367, subd. (a).) We believe this language, particularly the reference to "other communication," can encompass expressive associational activity. *Yu*, *supra*, 196 Cal.App.4th 779 is not to the contrary.

The Court of Appeal in that case held section 94367 does not provide protection for activity undertaken pursuant to the First Amendment right to petition the government for redress of grievances, which the court reasoned was "'analytically distinct from, although related to, the free speech clause.'" (*Id.* at p. 789 [quoting *Gable v. Lewis* (6th Cir. 2000) 201 F.3d 769].) By contrast, the right of expressive association at issue here has been held to be "closely linked" to First Amendment free speech rights and, indeed, partly "'implicit in'" such speech rights. (*Christian Legal Soc. Chapter of the University of Cal., Hastings College of Law v. Martinez* (2010) 561 U.S. 661, 680 (*Christian Legal*); *Healy v. James* (1972) 408 U.S. 169, 181; see also *Erotic Service Provider Legal Education and Research Project v. Gascon* (9th Cir. 2018) 880 F.3d 450, 458 [describing freedom of expressive association as protected under the "Freedom of Speech

Clause of the First Amendment"].) We are therefore unconvinced that "speech or other communication" should be read so narrowly as to exclude all expressive associational claims premised on section 94367.

The *Yu* decision, however, highlights a different point that is important to our analysis. Though the content and bounds of the legal interest plaintiffs assert via their section 94367 claim is defined by reference to constitutional principles, the interest is at bottom one conferred by statute—not by the state or federal constitutions. (*Yu*, *supra*, 196 Cal.App.4th at p. 790 ["Section 94367 cannot, of course, actually create or expand *constitutional* rights . . . . Rather, it creates *statutory* free speech rights for students of private postsecondary educational institutions"].) The opposite is true for USC's interest that is at least arguably impacted by this litigation. High court precedent, as we have noted, holds that a university's exercise of genuine academic judgment is of First Amendment dimension and deserving of deference from the courts.[4] (*Grutter*, *supra*, 539 U.S. at pp. 324,

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[4] The high court's decision in *Christian Legal* is not to the contrary. That was a case in which the plaintiff, a Christian-centered law school extracurricular organization, asserted constitutionally-based First Amendment rights. (*Christian Legal*, *supra*, 561 U.S. at p. 673.) In that context, the majority held the law school's decisions about the character of its student group program were due "decent respect" but the law school was owed "no deference" on the "question whether a public university has exceeded constitutional constraints." (*Id.* at pp. 686-687.) Plaintiffs here do not (and cannot) directly assert constitutional free speech rights—their claim arises only by the grace of state statute—and that renders *Christian Legal*'s pronouncement on deference inapplicable. Moreover, the law school's student organization rules in *Christian Legal* were not facially predicated

328-329 [acknowledging the Court has recognized a right to educational autonomy, grounded in the First Amendment itself]; *Regents of University of Michigan v. Ewing*, *supra*, 474 U.S. at p. 225 [great respect due when reviewing the substance of a genuinely academic decision]; see also *Board of Curators of University of Missouri v. Horowitz* (1978) 435 U.S. 78, 96, fn. 6 (conc. opn. of Powell, J.) ["University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation"].)

High court precedent also establishes the level of infringement necessary to show a violation of expressive association rights. A "significant[ ] effect" or "serious burden[ ]" on expressive associational activity must be shown to obtain relief. (*Boy Scouts of America v. Dale* (2000) 530 U.S. 640, 656 ["Having determined that the Boy Scouts is an expressive association and that the forced inclusion of Dale would significantly affect its expression, we inquire whether the application of New Jersey's public accommodations law to require that the Boy Scouts accept Dale as an assistant scoutmaster runs afoul of the Scouts' freedom of expressive association"] (*Dale*); *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 626-627 ["[T]he Jaycees has failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association. . . . [A]ny claim that admission of women as full voting members will impair a symbolic message conveyed by the

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on judgments about student academic performance in the way that USC's deferred recruitment policy (at least 12 units and at least a 2.5 GPA) very much is.

very fact that women are not permitted to vote is attenuated at best"]; see also *Dale*, *supra*, at pp. 658-659.) Where a university's First Amendment interest in freedom to make genuine academic-based judgments as to the performance of its students is implicated, we believe courts must strictly police the serious burden or significant effect threshold.

As cognizable given the standing limitations we have discussed, plaintiffs allege their expressive associational rights (and those of their members) are impacted in three ways. First, plaintiffs assert their opportunity to inculcate values in new recruits, and to have as many students as possible participate in "expressive association aspects" like leadership academy training, will be reduced by one semester.[5] Second, plaintiffs allege they lack "sufficient resources" to "recruit, train, and mentor" twice the number of students in the spring (emphasizing the "increased amount of foot traffic" will make it "significantly more difficult for fraternities to decide to whom to offer bids"),

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[5] Plaintiffs also pepper their complaint with speculative, conclusory assertions about the deferred recruitment policy's effect on membership. For instance, they assert "elimination of Fall recruitment" for first-year students "ultimately could lead to substantially fewer students being able to join sororities or fraternities of their choice." These sort of allegations are property disregarded. (*Shea Homes Limited Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246, 1254 [in ruling on a demurrer, a court "does not consider conclusions of fact or law, opinions, speculation, or allegations contrary to law or judicially noticed facts"].)

and they claim the quality of "training" they can provide to recruited students "will likely suffer." Third, plaintiffs allege the deferred recruitment policy "will likely lead to significant negative financial consequences" because students who become members after their first semester will be "significantly less likely" to live in fraternity housing.

If the deferred recruitment policy is the product of the university's genuine academic judgment that the policy will benefit student edification, these allegations of what is at most an attenuated effect on expressive associational activity would not suffice to make out the serious burden necessary to establish a section 94367 violation. But plaintiffs' complaint further alleges the policy was adopted not for any bona fide academic reason, but simply because USC administrators disapprove of the viewpoint plaintiffs espouse. That allegation stands in some contrast to other features of plaintiffs' complaint, which quotes USC documents and policies extolling virtues of fraternity and sorority membership, but if it were shown that plaintiffs are correct—that the policy has no genuine academic basis[6] and is a mere pretext for what plaintiffs call "discrimination" against fraternities and sororities—the complaint's allegations may well suffice. At this stage of the case, we must take as true plaintiffs' allegation that the deferred recruitment policy was enacted with "no factual basis" and merely as a discriminatory attempt to

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[6] Our use of "academic" here should be understood to include the broad range of student educational experiences and outcomes with which a university may be legitimately concerned, not simply a narrow grade point average statistical analysis. (See, e.g., *Christian Legal*, *supra*, 561 U.S. at p. 686; *Grutter*, *supra*, 539 U.S. at p. 328.)

place fraternities and sororities "in a disfavored category." We will therefore reverse the judgment of dismissal and remand to give plaintiffs the opportunity to attempt to substantiate this allegation. If they cannot, judgment for USC will again be warranted.

D. A Limited Public Forum Analysis Comes to the Same Point

The parties alternatively analyze the legal issues in this case by use of the limited public forum framework elucidated in prior cases, principally *Christian Legal*, *supra*, 561 U.S. 661. (See, e.g., *id.* at pp. 679, 685 [restrictions on speech activity in a limited public forum must be reasonable in light of the purpose served by the forum and may not discriminate against speech on the basis of viewpoint].) We will briefly do the same, and the outcome is no different when undertaking that mode of analysis.

Plaintiffs contend the deferred recruitment policy is unreasonable because Greek-letter organizations advance the purposes served by USC's RSO program, which plaintiffs identify as the relevant forum. They cite, for example, Dr. Carry's concession that Greek-letter organizations "provid[e] spaces for personal connection, brotherhood/sisterhood, academic support, and philanthropic engagement." Nothing in the record sets forth the purpose of USC's RSO program, but even assuming it is animated by such concerns, there is no contradiction in the view that plaintiffs contribute to the RSO program's purpose as a general matter but thwart its purpose when they recruit students shortly after they set foot on campus or while they are at least arguably underperforming academically. Plaintiffs also contend the policy is unreasonable "in light of the many other ways in

which USC could pursue its stated purpose of helping first-semester students 'acclimate.'" But "[r]easonableness is not the legal equivalent of narrow tailoring or least restrictive means; indeed, the government's chosen method to preserve the character of a limited public forum 'need not be the most reasonable or the only reasonable limitation.' [Citation.]" (*Flint v. Dennison* (9th Cir. 2007) 488 F.3d 816, 834-835.) Plaintiffs' insistence that USC's "rejection of less restrictive policy options" somehow "underscores that its chosen policy is unreasonable" cannot be reconciled with this standard.

Although plaintiffs' allegations therefore do not suffice, on this record, to establish the requisite unreasonableness element of a limited public forum analysis, plaintiffs (as we have already seen) further contend the deferred recruitment policy is not "a generally applicable policy that constrains all student groups," but rather a viewpoint discriminatory regulation that places "unique burdens" on fraternities and sororities. "To determine whether a restriction in a limited public forum is viewpoint neutral we look to the rationale behind the restriction. Specifically, [courts] inquire whether 'the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.' [Citation.]" (*Kunde v. Seiler* (2011) 197 Cal.App.4th 518, 537.) "'[T]he fact that [a restriction] cover[s] people with a particular viewpoint does not itself render the [restriction] content or viewpoint based.' [Citation.]" (*Christian Legal Society*, *supra*, 561 U.S. at pp. 695-696.) The validity of the deferred recruitment policy under limited public forum analysis turns on plaintiffs' ability to make such a showing, and as we have already explained, they must be given their opportunity to back up the allegation with evidence.

E. The Trial Court Must Redetermine the Question of a Preliminary Injunction

With all that we have said, including our observation that plaintiffs have a low but non-negligible likelihood of succeeding on the merits of their section 94367 cause of action, we of course would be capable of performing the preliminary injunction calculus ourselves in the first instance. But the trial court never resolved the question concerning the balance of interim harms from implementation of the deferred recruitment policy and our Supreme Court has cautioned reviewing courts to avoid undertaking such an analysis in the first instance. (*Right Site Coalition v. Los Angeles Unified School Dist.* (2008) 160 Cal.App.4th 336, 345-346 [remanding to the trial court "because it is the role of this court to review the trial court's exercise of its discretion in applying and weighing the two interrelated factors, rather than to exercise discretion in the first instance"]; see also *King v. Meese* (1987) 43 Cal.3d 1217, 1228 [when the single preliminary injunction factor considered by the trial court does not support the trial court's conclusion, it is "[n]ormally . . . appropriate to remand the case to the trial court for consideration [of the other factor]"].)

On remand, the trial court should reassess both preliminary injunction factors in light of this opinion. Two points already made bear brief repetition. First, although plaintiff emphasizes "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" (*Elrod v. Burns* (1976) 427 U.S. 347, 373), plaintiffs assert only statutory rights and courts in any event "will not presume irremediable injury or the inadequacy of legal remedies based

simply on assertion of a constitutional theory for relief." (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1472; see also *Overstreet v. Lexington-Fayette Urban County Government* (6th Cir. 2002) 305 F.3d 566, 578.) Second, plaintiffs have no standing to assert interests of—or alleged harms to—non-members. Allegations of harm to non-member first-semester students who, as plaintiffs put it in their opening brief, "miss out on social events, philanthropic engagement, the opportunity to build brotherhood and sisterhood, and myriad other benefits" should not be part of an interim harm analysis.

DISPOSITION

The judgment of dismissal is reversed and the matter is remanded for further proceedings consistent with this opinion. All parties shall bear their own costs on appeal.

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BAKER, Acting P. J.

We concur:

MOOR, J.

KIM, J.